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FIRST GENERAL COUNSEL'S REPORT

CELA

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COMPLAINT FILED: 1/23/2014
NOTIFICATION: 1/29/2014
LAST RESPONSE RECEIVED: 2/12/2014
ACTIVATED: 3/10/2014

EARLIEST SOL: 7/19/2018
LATEST SOL: 1/8/2019
ELECTION CYCLE: 2014

COMPLAINANT: Gregory Smith

RESPONDENTS: Niger Innis
Niger Innis Action Fund (a.k.a.
Niger Innis for Congress Exploratory Committee)¹
Niger Innis for Congress and Dan Backer in his
official capacity as treasurer

RELEVANT STATUTES
AND REGULATIONS: 2 U.S.C. § 431(2)
2 U.S.C. § 432(e)(1)
2 U.S.C. § 433(a)
2 U.S.C. § 434(a)
11 C.F.R. § 100.72
11 C.F.R. § 100.131
11 C.F.R. § 101.1(a)
11 C.F.R. § 101.3

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

¹ Complainant names two exploratory committees as respondents, Compl. at 1, but Respondents state that Innis's exploratory committee was the "Niger Innis Action Fund" and that Innis did not maintain two exploratory committees. Resp. at 3 (Feb 12, 2014).

I. INTRODUCTION

The Complaint in this matter alleges that Niger Innis, the Niger Innis Action Fund, the Niger Innis for Congress Exploratory Committee, and Niger Innis for Congress and Dan Backer in his official capacity as treasurer (the "Committee") (collectively "Respondents"), violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by failing to file a Statement of Candidacy within 15 days of Innis becoming a candidate for the 2014 election for the U.S. House of Representatives in Nevada. The Complaint alleges that Innis, who filed a Statement of Candidacy with the Commission on January 9, 2014, had crossed over to candidate status at least six months earlier when he developed a sophisticated campaign proposal for discussions with the National Republican Congressional Committee ("NRCC"), maintained a committee website soliciting contributions, held a "high-level fundraising event" with a stated goal of raising \$50,000, and made or authorized statements in the press concerning his candidacy.²

Respondents in a joint response deny that Innis was a candidate prior to January 2014, asserting that Innis was only "testing the waters" prior to that date, that their level of fundraising was not unreasonable for exploring a possible race against an incumbent, and that Innis's testing the waters activity was not conducted over a protracted period of time because a "six[sic] month period of test[ing] the waters activity is usual and expected."³ Respondents explain that consulting with a committee like the NRCC on the feasibility of Innis's candidacy was expected and that Innis appeared regularly in the media as a "public commentator on social issues" separate and apart from his testing the waters activity.⁴ Finally, Respondents assert that all solicitations, including a website and the fundraising event flyer referenced in the Complaint,

² Compl. at 1-2.

³ Resp. at 2-4.

⁴ Resp. at 2-3.

1 stated that they were intended "to gauge support and raise funds" for Innis's "exploratory"
2 committee and were permissible under the Act.⁵

3 As discussed below, the available information does not indicate that Innis decided to run
4 for federal office or conducted activities that indicate that he decided to become a candidate, or
5 that he amassed the level of funding triggering candidate status prior to January 2014.

6 Therefore, we recommend that the Commission find no reason to believe that Innis violated
7 2 U.S.C. § 432(e)(1) or 11 C.F.R. § 101.1(a), that the Committee violated 2 U.S.C. §§ 433(a) or
8 434(a), or that the Niger Innis Action Fund (a.k.a. the Niger Innis for Congress Exploratory
9 Committee) violated the Act, and that it close the file in this matter.

10 II. FACTUAL AND LEGAL ANALYSIS

11 A. Factual Background

12 Niger Innis was a candidate for Congress in the 2014 primary election for the 4th
13 Congressional District of Nevada.⁶ Innis filed his Statement of Candidacy on January 9, 2014,
14 and established Niger Innis for Congress as his principal campaign committee by filing a
15 Statement of Organization the same day. Innis publicly announced his candidacy at a press
16 conference on January 15, 2014.⁷ (The Complaint was signed on January 16, 2014, and was
17 received at the Commission on January 23, 2014.) According to press reports, Innis also
18 announced his candidacy by sending an e-mail blast around the same date, stating that "[a]fter

⁵ Resp. at 2-4.

⁶ Innis lost the Republican primary held on June 10, 2014, with 33% of the vote. *See Complete list: Primary Election Results*, RENO GAZETTE-JOURNAL (June 11, 2014), <http://www.rgj.com/story/news/politics/2014/06/10/2014-primary-election-results/10305467/>; Laura Myers, *Hardy Nabs Win in 4th Congressional District's Primary*, LAS VEGAS REVIEW-JOURNAL (June 10, 2014), <http://www.reviewjournal.com/politics/elections/hardy-nabs-win-4th-congressional-district-s-gop-primary>.

⁷ *See* John Gizzi, *Niger Innis Declares Bid for Nevada Congressional Seat*, NEWSMAX (Jan. 15, 2014), <http://www.newsmax.com/politics/niger-innis-nevada-congress/2014/01/15/id/547211/>.

1 careful thought and deep prayer I've reached a decision . . . I am running to be the next
2 congressman from Nevada's 4th Congressional District."⁸ The Committee then filed its first
3 disclosure report with the Commission, the 2014 April Quarterly Report, on April 15, 2014,
4 disclosing activity dating back to October 2013.

5 In its April Quarterly report, the Committee disclosed 30 contributions totaling
6 \$53,876.00 that it received between October 25, 2013 and January 8, 2014, and sixteen
7 disbursements totaling \$14,159.42 made between October 29, 2013 and January 2, 2014.⁹ The
8 contributions ranged from \$250 to \$2,600 from individuals, and one \$5,000 payment from a
9 political committee.¹⁰ The disbursements included payments in amounts ranging from \$73 to
10 \$2,000 for "campaign administration services," "legal and compliance consulting services," and
11 expense reimbursements.¹¹

12 The Complaint alleges that Innis decided to become a candidate by July 2013, well
13 before actually filing his statement of candidacy in January 2014.¹² Complainant states that Innis
14 "has been touting and planning a run for Congress" since the summer of 2013, was no longer
15 testing the waters by July 2013, but was actively campaigning for the Congressional seat during
16 the six months prior to announcing his candidacy.¹³ In support of the allegations, the
17 Complainant identifies a proposal titled "Innis for Congress; NRCC Proposal" ("NRCC
18 Proposal") dated July 19, 2013, an Innis exploratory committee website that included a portal for

⁸ See Mike Donahue, *Innis to Run for Congress*, THE SPECTRUM (Jan. 15, 2014),
<http://www.thespectrum.com/story/news/2014/01/16/innis-to-run-for-congress/4547079/>.

⁹ See 2014 April Quarterly Rpt., Niger Innis for Congress.

¹⁰ *Id.* at 5-33.

¹¹ *Id.* at 34-58.

¹² Compl. at 1-2.

¹³ *Id.*

1 accepting contributions, an invitation/flyer advertising a November 2013 fundraiser benefiting
2 Innis, and a number of press articles purportedly illustrating Innis's general public political
3 advertising.¹⁴

4 The NRCC Proposal evaluates Innis's candidacy for Congress and presents a "strategic
5 campaign plan" that would involve building a "'new' Republican voter base" in the district and
6 getting certain candidates elected to local and state offices.¹⁵ The proposal sets September 1,
7 2013, as the "kickoff date" for the strategy and states that "Innis for Congress is far down the
8 road to picking up the building blocks and seeing if they will fit into the whole."¹⁶ In addition to
9 proposing a wide-ranging voter identification and registration effort, the proposal also discusses
10 the importance of identifying minority candidates for local and state races in the district as part
11 of the effort to build a solid foundation and names a number of fundraising target groups.¹⁷

12 Notably, the proposal repeatedly refers to Innis as a "candidate." It highlights Innis's
13 work with various social issues, and states that he is "the right candidate, at the right time, to
14 bring together a blended coalition of registered voters" and that "Innis will boldly lead a
15 candidacy that will immediately set the Democrats on the defensive."¹⁸ In discussing his skills
16 and qualifications, the proposal addresses Innis's ability for "[p]lain talk," and that "[n]o
17 candidate is better prepared to talk to the people of CD04 than Niger Innis."¹⁹ The proposal

¹⁴ *Id.*

¹⁵ *Id.*, Ex. 1 at 5. The NRCC proposal states that Innis is the right "candidate" for the 4th Congressional District and proposes a three-stage strategy that includes minority outreach to build a new voter base. *Id.* at 1, 5-6.

¹⁶ *Id.* at 6, 8.

¹⁷ *Id.* at 8-9.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 3 (adding that "[i]t is this personal, hands-on, caring approach that will lead Innis . . . to earn the vote and support of the people").

1 declares that "Niger Innis is the candidate with the potential to" hold the rural vote, close the
2 registered voter gap, and get votes in urban precincts.²⁰ The Complaint concludes that the
3 "[p]roposal shows that Mr. Innis had done much of the analysis necessary to determine whether
4 to run in NV4 as early as July 2013" and thus any purported "testing the waters" activities
5 conducted after that time "do not seem to be legitimate."²¹

6 The Complaint also points to Innis's exploratory committee website that contained a
7 contribution portal, which according to the Complainant solicited contributions "in support of a
8 run for Congress already planned and in motion."²² A printout displaying that portal was
9 attached to the Complaint. The printout, dated January 13, 2014, contains language stating "[i]f
10 you support Niger Innis as he explores a possible campaign for Congress," signing the petition or
11 making a contribution would "help [Innis] make the decision to run."²³ The single-page printout
12 includes an area to "sign the petition," including a space for entering a name, e-mail address and
13 zipcode, a button labeled "Contribute to Niger" and indicates that it was paid for by the "Niger
14 Innis Action Fund."²⁴ A review of previous versions of the webpage reveals that the language on
15 the page provided from January 2014 was the same as a version dated November 14, 2013.²⁵

16 Additionally, the Complaint includes a copy of a flyer announcing a "private reception to
17 support Niger Innis and the Niger Innis Congressional Exploratory Committee" held on

²⁰ *Id.* at 5.

²¹ Compl. at 1-2.

²² *Id.* at 1.

²³ Compl., Ex. 2.

²⁴ *Id.*

²⁵ The printout provided with the Complaint, however, does not include the photograph and graphics that appear on the actual webpage. See *Support Niger Innis*, INTERNET WAYBACK MACHINE, <https://web.archive.org/web/20131114075848/http://nigerinnisforcongressexploratorycommittee.com/>.

1 November 5, 2013 along with a press article discussing this fundraiser.²⁶ The flyer names
2 supporters such as Sheldon Adelson and special guest Herman Cain, lists ticket fees ranging
3 from \$500 to \$2,600, and includes language concerning federal political contribution limits. The
4 press article discussing the fundraiser includes statements attributable to Innis that address the
5 factors in consideration for a potential candidacy. According to the article, Innis stated that his
6 "ability to raise money will determine whether he officially runs for Congress" and that the event
7 was "expected to attract more than 250 people and raise at least \$50,000."²⁷ Innis also indicated
8 that he needed "to raise \$2 million to be competitive against [likely Democratic nominee]
9 Horsford."²⁸ The Complaint also included a page from Innis's personal website with an article
10 dated after the November 5th fundraiser titled "Niger Innis Weighs in On Potential
11 Congressional Run," inviting readers to watch an Innis television appearance and to view
12 Herman Cain's speech from the fundraiser.²⁹ Although the article does not refer to Innis as a
13 candidate, the Complaint alleges that the Innis campaign's activities — specifically, including a
14 "high-level fundraising event," a website soliciting contributions over the internet, and the
15 NRCC proposal — exceed testing the waters activities.³⁰

²⁶ Compl., Exs. 3-4. We do not know how the fundraising event was advertised, but we did find it listed as an event on the nonprofit Sunlight Foundation's Party Time website, which maintains a database of political fundraisers. See <http://politicalpartytime.org/party/36094/>.

²⁷ Compl., Ex. 4 at 2-3.

²⁸ *Id.* at 3. A different article previewing the fundraiser notes that the funds raised at the event will go to Innis's "as-yet unofficial campaign to oust freshman Democratic Rep. Steven Horsford." Peter Olsen-Phillips, *Mega-giver Sheldon Adelson and GOP Bigwigs Push African American Conservative for Congress*, POLITICAL PARTY TIME (Oct. 29, 2013), <http://politicalpartytime.org/blog/2013/10/29/mega-giver-sheldon-adelson-and-gop-bigs-push-african-american-conservative-for-congress/>.

²⁹ Compl., Ex. 5.

³⁰ Compl. at 1-2.

1 Respondents submitted a joint response to the Complaint denying the allegations and
2 asserting that Innis conducted testing the waters activities from July 2013 through December
3 2013 "for the purpose of gauging support and raising funds."³¹ Respondents note that a six-
4 month testing the waters period is "usual and expected to properly explore the feasibility of
5 challenging a Congressional incumbent."³² According to the Respondents, these activities
6 properly included privately presenting a proposal to the NRCC "for the sole purpose of exploring
7 the feasibility of becoming a candidate."³³ Respondents assert that it is not out of the ordinary
8 for someone to consult with the NRCC, "a political committee who [*sic*] is devoted to
9 maintaining and increasing the 232-member Republican majority in the United States House of
10 Representatives, on the feasibility of running for office."³⁴ Further, Respondents argue that it
11 was proper to both "gauge support and raise funds for . . . testing the waters activity" through
12 the Innis exploratory committee's website and to host a fundraiser.³⁵ Respondents note that there
13 are no prohibitions against hosting a "high-level fundraising event" for the purpose of testing the
14 waters and that while a \$50,000 goal "may seem great," raising such amounts was necessary in
15 order to determine whether Innis should run for federal office.³⁶ Regarding Innis's media
16 appearances, Respondents state that Innis did not purchase any public air time, but rather was a
17 "regular public commentator on social issues."³⁷

³¹ Resp. at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 2-3.

³⁵ *Id.* at 3-4.

³⁶ *Id.*

³⁷ *Id.* at 3.

1 Indeed, Innis appeared in the media discussing a variety of social and political issues in
2 his role as a spokesman for the Congress of Racial Equality ("CORE"), a strategist for
3 TheTeaParty.net, and as a representative for various other organizations.³⁸ Statements and
4 appearances by Innis after the November 5th fundraiser, however, specifically mention his
5 potential candidacy. After the fundraiser, Innis posted a letter on his exploratory committee
6 website to supporters stating "[a]s I prepare to declare for the race, please know that your support
7 at this early stage is of utmost importance."³⁹ Innis also made a number of media appearances in
8 which his candidacy was discussed. For instance, during a November 11, 2013, interview on the
9 Fox Business Network, interviewer Neil Cavuto introduced Innis as an individual "also filing
10 paperwork to run for a Congressional seat," a statement which Innis did not address or correct
11 during the interview.⁴⁰ During a telephone interview, Innis told a reporter that he was
12 considering a congressional run, but "[m]y attorney says that until it is official, that until I file
13 paperwork, I cannot say that I am a candidate for Congress."⁴¹ Other than these statements, we
14 have not located any publicly-available statements by Innis prior to January 2014 in which Innis
15 referred to himself as a candidate.

³⁸ See, e.g., *Niger Innis Bio*, CORE, <http://www.core-online.org/Staff/niger.htm> (listing examples of media appearances); Jennifer Burke, *Niger Innis vs. Leo Terrell: A Stark Contrast in Conservatism vs. Liberalism*, BENJAMIN POST (Apr. 2, 2013), <http://www.thebenjaminpost.com/niger-innis-vs-leo-terrell-a-stark-contrast-in-conservatism-vs-liberalism/>; Kurt Wallace, *Niger Innis: Alan Grayson Exploiting African-American History*, RARE (Oct. 23, 2013), <http://rare.us/story/niger-innis-alan-grayson-exploiting-african-american-history/>; see also "Niger Innis" Search Results, YOUTUBE, http://www.youtube.com/results?search_query=niger+innis (listing videos featuring Innis appearances, some dating back several years).

³⁹ See *A Letter from Niger Innis*, NIGER INNIS EXPLORATORY COMMITTEE FOR CONGRESS, available at <http://us3.campaign-archive1.com/?u=a9a49d0028ae59e1de4effdc3&id=6879454b28>.

⁴⁰ See *Tea Party Resurgence*, RIGHTSIGHTINGS @SLABOE YOUTUBE CHANNEL (Nov. 11, 2013), <http://www.youtube.com/watch?v=OfRorUK4VuI>. The description of the YouTube video states "Tea Party activists Katrina Pierson and Niger Innis join FBN's Neil Cavuto on the "B-Side" segment to discuss both their plans to run for congressional seats in 2014 while representing the core values of the Tea Party."

⁴¹ See Bill Hoffman, *Niger Innis Considering Congressional Run*, NEWSMAX (Nov. 18, 2013), <http://www.newsmax.com/NewsmaxTv/innis-congressional-candidacy-strategist/2013/11/18/id/537310/>.

B. Legal Analysis

Under the Act, “an individual who seeks nomination for election, or election, to Federal office” is a candidate and “shall be deemed to seek nomination for election, or election” when he receives contributions or makes expenditures in excess of \$5,000.⁴² A candidate is required to designate in writing a principal campaign committee within fifteen days of reaching this \$5,000 threshold.⁴³ The designated principal campaign committee, in turn, is required to file a Statement of Organization within ten days of designation or, alternatively, report any change in information previously submitted on its Statement of Organization within ten days of the change.⁴⁴

The Commission has created a limited exemption to the definitions of contribution and expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to conduct certain activities designed to evaluate a potential candidacy (*e.g.*, to “test the waters”).⁴⁵ Funds received and payments made “solely for the purpose of determining whether an individual should become a candidate” are not considered contributions or expenditures under the Act.⁴⁶ These funds, however, are subject to the limitations and prohibitions of the Act.⁴⁷ After an individual reaches candidate status, all reportable amounts from the beginning of the “testing the

⁴² 2 U.S.C. § 431(2).

⁴³ *Id.* § 432(e)(1).

⁴⁴ *Id.* § 433(a), (c).

⁴⁵ *See* 11 C.F.R. §§ 100.72, 100.131.

⁴⁶ *See* 11 C.F.R. §§ 100.72, 100.131.

⁴⁷ *See* 11 C.F.R. §§ 100.72, 100.131.

1 waters" period must be disclosed on the first financial disclosure report filed by the candidate's
2 committee, even if the funds were received or expended prior to the current reporting period.⁴⁸

3 An individual who is testing the waters is not required to register with the Commission
4 unless and until he or she both surpasses the statutory threshold and decides to run for federal
5 office, a decision that may be indicated by certain activities.⁴⁹ Commission regulations describe
6 five non-exhaustive examples of activities that indicate that an individual is not merely testing
7 the waters, but has decided to become a candidate for federal office:

- 8 (1) The individual uses general public political advertising to publicize his or her
9 intention to campaign for Federal office;
10
11 (2) The individual raises funds in excess of what could reasonably be expected to be
12 used for exploratory activities or undertakes activities designed to amass
13 campaign funds that would be spent after he or she becomes a candidate;
14
15 (3) The individual makes or authorizes written or oral statements that refer to him or
16 her as a candidate for a particular office;
17
18 (4) The individual conducts activities in close proximity to the election or over a
19 protracted period of time; and
20
21 (5) The individual has taken action to qualify for the ballot under State law.⁵⁰

22 These regulations seek to draw a distinction between activities directed to an evaluation of the
23 feasibility of one's candidacy and conduct signifying that a decision to become a candidate has
24 been made.⁵¹

25 The Complaint alleges that Innis triggered candidate status by July 2013, several months
26 before he registered as a candidate with the Commission, based on activities that included

⁴⁸ See 2 U.S.C. § 434(a); 11 C.F.R. §§ 100.72(a), 100.131(a), 101.3, 104.3(a).

⁴⁹ See 11 C.F.R. §§ 100.72(b), 100.131(b).

⁵⁰ *Id.*

⁵¹ See Advisory Op. 1981-32 (Askew) at 4 ("AO 1981-32").

1 making public statements, the development of a proposal with the NRCC, a "high-level"
2 fundraiser that aimed to raise at least \$50,000, and website solicitations. The Commission has
3 approved reason to believe or probable cause findings where a potential candidate's statements
4 clearly indicated the individual's decision to run.⁵² Here, while Innis indeed made public
5 statements prior to becoming a candidate, it appears that he did so in his role as a social and
6 political commentator and did not discuss his candidacy in most of his appearances. During the
7 Fall of 2013 Innis made a number of media appearances in which the subject of his candidacy
8 came up, but none of these appearances included statements directly attributable to Innis
9 indicating that he had decided to become a candidate. Rather Innis is quoted only contemplating
10 a Congressional run. In one television interview with Neil Cavuto, Cavuto refers to Innis as an
11 individual who was "also filing paperwork to run for a Congressional seat," and Innis neither
12 addresses that introduction nor corrects it at any point during the interview.⁵³ However, there is
13 no information available to show that Innis authorized this characterization of himself as a
14 candidate. In another interview, Innis may have suggested that he had already decided to run

⁵² See, e.g., MUR 5693 (Aronsohn) (Commission found probable cause to believe that individual became a candidate when he sent a solicitation letter that included statements such as "But I have the energy, the experience, and the determination to win this race. And as evidenced by the attached news article, I am ready to begin fighting for our future...now"; "Every dollar we receive in the next few weeks can help us prepare for this fight against [incumbent] Scott Garrett"; and "We have come a long way in just a few short weeks. And with your support, we can go the distance"); MUR 5251 (Rogers) (Commission found reason to believe that individual no longer testing the waters when he sent a fundraising letter that contained the statement, "I know that I will effectively serve your interests in Congress and that because of the close working relationship with the President and the leadership of Congress that I will immediately work for the benefit of Colorado. Won't you please fill out the enclosed reply card indicating how you can help my campaign?" and reportedly said, "I want to be your congressman and need your help to win the seat" at a fundraising event). But see MUR 5934 (Thompson) (Commission failed, by a vote of 2-4, to find reason to believe, and then voted to dismiss allegations, that Thompson became a candidate by making statements such as "I can't remember exactly the point that I said, 'I'm going to do this,' but when I did, the thing that occurred to me 'I'm going to tell people that I am thinking about it and see what kind of reaction I get to it,'" and was quoted as saying that he was "testing the waters" about a run, "but the waters feel pretty warm to me" and "You're either running or not running. I think the steps we've taken are pretty obvious").

⁵³ See *Tea Party Resurgence*, RIGHTSIGHTINGS @SLABOE YOUTUBE CHANNEL (Nov. 11, 2013), <http://www.youtube.com/watch?v=QfRorUK4VuI>.

1 when he stated that he could not say that he was a candidate because "[m]y attorney says that
2 until it is official, that until I file paperwork, I cannot say that I am a candidate for Congress."⁵⁴
3 Both of these statements took place in November, after Innis's "high-level" fundraiser, and
4 therefore, after Innis had the opportunity to gauge his ability to raise funds. But while these
5 examples may raise questions as to whether Innis decided to become a candidate at an earlier
6 point, they are not unequivocal indications that Innis in fact made a final decision regarding his
7 candidacy. Rather, these examples equally support the argument that steps were being taken to
8 reach that final decision.⁵⁵ Similarly, Innis's website solicitation and the flyer for the fundraiser
9 event both contained language indicating that they were intended to benefit his exploratory
10 committee for a possible run for Congress and did not state that Innis was in fact a candidate.

11 The fact of the NRCC Proposal does not add weight to the claim that Innis decided to become a
12 candidate at an earlier point. The document sets forth a campaign strategy and refers to Innis as a
13 "candidate" at various points. However, it is clearly labeled a "proposal" and according to Respondents,
14 was "privately presented" to the NRCC. The proposal does not state that Innis had already concluded
15 that he would run either, but rather explores Innis's chances, if he were to run, outlines a strategic
16 campaign plan that Innis could follow, and according to Respondents, was presented to the NRCC to
17 obtain a view on "the feasibility of [Innis] becoming a candidate for federal office."⁵⁶ The Respondents
18 have provided no further information about how the proposal was used, and the Complainant has not
19 indicated how he obtained a copy of the proposal either. Therefore, based on the available information,

⁵⁴ See Bill Hoffman, *Niger Innis Considering Congressional Run*, NEWSMAX (Nov. 18, 2013),
<http://www.newsmax.com/NewsmaxTV/innis-congressional-candidacy-strategist/2013/11/18/id/537310/>.

⁵⁵ See, e.g., MUR 5934 (Thompson) (Commission could not agree that Thompson's statements that "the waters feel pretty warm" and that "the steps we've taken are pretty obvious," were sufficient indicia that he crossed the line into candidate status).

⁵⁶ Resp. at 2.

1 the proposal appears to have been a private statement by Innis for the purpose of pitching himself as a
2 viable candidate to a large and influential political organization that could weigh in on his political
3 prospects and ultimately support his campaign efforts. The Commission has advised that using the
4 services of political consultants and opinion research specialists are permissible testing the waters
5 activities if they are undertaken to explore the feasibility of becoming a candidate.⁵⁷ The Commission
6 has also found that "the mere preparation, rather than the dissemination, of campaign materials in
7 advance of a declaration of candidacy does not by itself provide adequate evidence to support a reason
8 to believe that [an individual] decided to become a candidate at that time."⁵⁸ Here, there is no
9 information that the NRCC Proposal was prepared after Innis had already made a final decision to
10 become a federal candidate, or that the proposal was intended to be distributed publicly. Instead, the
11 proposal and the discussions with the NRCC that may have followed appear to have been yet another
12 aspect of Innis's testing the waters activity, akin to hiring political consultants or pollsters to evaluate
13 the prospects of a potential candidacy and the preparation of a campaign plan for a possible future
14 campaign.

15 Further, neither the fact that Innis held a fundraiser nor the amount that Innis raised at the
16 November fundraiser, on its own, would be sufficient to conclude that he had become a candidate for
17 federal office at an earlier point. According to its 2014 April Quarterly Report, the Committee received
18 contributions totaling \$53,876 between October 25, 2013 and January 8, 2014, with most of those

⁵⁷ See AO 1981-32 at 2-4 (concluding that hiring political consultants to assist with advice on the potential and mechanics of constructing a national campaign organization and employing a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign were within the scope of the testing the waters exemption as long as the prospective candidate conducted the activities while continuing to deliberate his decision to become a candidate); *see also* Factual & Legal Analysis at 5-6, MUR 6196 (Kennedy) (concluding that having discussions with political consultants to determine the viability of a potential candidacy and commissioning a poll to assess name recognition were within the "testing the waters" exemption).

⁵⁸ See F&LA at 6, MUR 6533 (Perry Haney for Congress) (concluding that Haney's creation of videos containing clear references to him as a candidate that were only shared with a small group of individuals and were created for the purpose of preparing for a campaign if one were to ensue was consistent with testing the waters activities).

1 contributions received in October and November, in close proximity to the November 5 fundraiser.
2 \$53,876 is within the range that the Commission has found to be reasonable for testing the waters
3 activity without additional indicia of candidate status. In the past, the Commission has either dismissed
4 or found no reason to believe in matters where a committee raised over \$100,000 where there were no
5 additional indicia of candidate status.⁵⁹ Thus, the amount and duration of Respondents' fundraising do
6 not themselves suggest candidate status for Innis prior to January 2014.

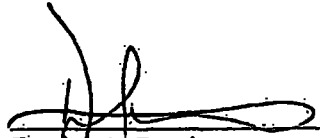
7 Because there is no information available that Innis became a candidate prior to January 2014,
8 both Innis and the Committee timely filed the Statement of Candidacy and Statement of Organization,
9 respectively, and the Committee timely filed its first disclosure report with the Commission, the 2014
10 April Quarterly Report. We therefore recommend that the Commission find no reason to believe that
11 Innis violated 2 U.S.C. § 432(e)(1) or 11 C.F.R. § 101.1(a), the Committee violated 2 U.S.C. §§ 433(a)
12 or 434(a), or that the Niger Innis Action Fund (a.k.a. the Niger Innis for Congress Exploratory
13 Committee) violated the Act. Finally, we recommend that the Commission close the file.

⁵⁹ See, e.g., MUR 6224 (Fiorina) (no reason to believe where U.S. Senate candidate's campaign committee raised in excess \$3.5 million in contributions during the "testing the waters" phase of a campaign); MUR 5703 (Rainville) (no reason to believe where a U.S. Representative candidate's campaign raised \$100,000); MUR 5661 (Butler) (no reason to believe where a U.S. Senate candidate's campaign raised \$100,000); MUR 2710 (Judge Harvey Sloane) (no reason to believe where a U.S. Senate candidate's campaign committee raised \$200,000).


III. RECOMMENDATIONS

1. Find no reason to believe that Niger Innis violated 2 U.S.C. § 432(e)(1) or 11 C.F.R. § 101.1(a).
2. Find no reason to believe that Niger Innis for Congress and Dan Backer in his official capacity as treasurer violated 2 U.S.C. §§ 433(a) or 434(a).
3. Find no reason to believe that Niger Innis Action Fund (a.k.a. the Niger Innis for Congress Exploratory Committee) violated the Act in this matter.
4. Approve the attached Factual and Legal Analysis.
5. Close the file.
6. Approve the appropriate letters.

7/8/14
Date


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Assistant General Counsel


Ana J. Peña-Wallace
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